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No. 85-2049

In The
Supreme Court of the United States
October Term, 1985

Choon Young Chung,
Petitioner,

vs.

NANA Development Corporation, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT NANA DEVELOPMENT CORP., INC., TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a resident of Virginia can travel to Alaska, purchase goods there from an Alaska corporation to carry back to Virginia, and because the Alaska corporation subsequently voluntarily ships part of the goods to Virginia by common carrier, secure jurisdiction over the Alaskan corporation by the Virginia long-arm statute.

RULE 28.1 STATEMENT

NANA Development Corporation, Inc., is a wholly owned subsidiary of NANA Regional Corporation, Inc., a corporation formed for the Eskimos of Northwest Alaska (Kotzebue area) pursuant to the provisions of Section 7 of the Alaska Native Claims Settlement Act of 1971, as amended, Public Law 99-203, Act of December 18, 1971, 85 Stat. 688, 43 U.S.C. § 1601, § 1606. Each qualifying Eskimo received initially 100 shares of stock and, until December 18, 1991, with minor exception, " . . . the stock [of NANA Regional Corp., Inc.] inchoate rights thereto, and any dividends paid or distributions made with respect thereto may not be sold, pledged, subjected to a lien or judgment execution assigned in present or future, or otherwise alienated. . . ." 16 U.S.C. § 1406(g)(1).

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STATEMENT OF THE CASE

Petitioner's statement of the case requires correction and amplification. Petitioner ("Chung") is a resident of Virginia.[1] NANA Development Corporation, Inc.

[1] JA 43. Citations are to the Joint Appendix before the Court of Appeals.

("NANA"), is a corporation organized under the laws of Alaska with its principal place of business in Alaska. (JA 4) NANA engages in the sale of reindeer antlers primarily to a joint venture, of which it is a party, which horns, after processing, are sold in the Orient. (JA 30-31, 53-54)

NANA has never solicited business in Virginia. (JA 13) NANA made no overtures to Chung in Virginia but Chung, in May, 1982, called NANA's offices in Alaska to inquire whether, if he came to Alaska, he could watch NANA's reindeer roundup and buy antler horn. (JA 32, 43) Chung was told he would have to come to Nome, Alaska, both to purchase and take personal delivery of any antler he might buy (JA 46), and transport it to Virginia himself (JA 51).

Chung told NANA he wanted to purchase 500 pounds of antler (JA 50), but he was under no obligation to do so. Chung traveled to Alaska, and on June 14, 1982, in Kotzebue, Alaska, an invoice was prepared by NANA indicating that Chung paid in full by personal check (JA 36, 39) and cashier's check (JA 40) for 500 pounds of antler at $35.00 per pound (JA 36, 39, 48-49). At the same time the invoice was prepared, the checks were tendered to NANA by Chung (JA 35-36). The invoice was the first and only written evidence of a sale.

After Chung's arrival, NANA's representative, John W. Schaeffer, Jr., told his staff to have 500 pounds of frozen reindeer antlers ready at the Nome airport for delivery for Chung. (JA 50) However, only 120 pounds were available at the airport on June 14, 1982 (JA 55), when Chung arrived at the Nome Airport to depart only

five to seven minutes prior to his scheduled flight. He therefore could not wait for NANA to bring additional frozen horn to him to take back to Viriginia. (JA 67-68) Mr. Schaeffer "voluntarily undertook" (Pet. at 4) to ship the balance via the next available flight (JA 66). On June 15, 1982, NANA consigned to an air carrier three boxes of "frozen reindeer horns" for delivery to "airport in Washington, D.C." (JA 41, 72) The airbill had clearly marked in two places the instructions "keep frozen." (JA 41, 79-80) NANA also clearly marked the boxes containing the antler "keep frozen" with stickers. (JA 38) The delivery was sent collect and no insurance was obtained or declared value stated. (JA 74) It was the understanding of NANA that such a shipment was "F.O.B. Nome" and that NANA's liability for the safety of the shipment would therefore end at Nome Airport. (JA 75, 77)

When Chung was notified four days after NANA consigned the frozen antler to the carrier that the shipment had arrived at the Washington National Airport, he found that the antlers had thawed and were spoiled and unusable. (JA 58) Chung protested to the carrier that it had ignored the notations on the boxes that the antlers should be kept frozen. (JA 59) However, because the shipment had no insurance and no declared value, the air carrier reimbursed Chung only $160.00. (JA 63) NANA told Chung to ship the horn to a business associate in San Francisco to see if could be salvaged. Chung never sent the horn, although he said he would. (JA 78) NANA also offered to replace the horn. (JA 62) Chung thereafter filed suit against NANA in Virginia.

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REASON FOR DENYING WRIT

The Decision Below Comports With Applicable Decisions of This Court.

Petitioner argues that the circuit court has confused the situation involving jurisdiction based on a single action (this case) with the situation involving jurisdiction based on "continuous and systematic" contacts with the forum state. But what the circuit court did was analyze the decisions of this Court in *Burger King Corp. v. Rudzewicz*, — U.S. —, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980); and *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and against that analysis determined that under the facts of this case the "traditional conception of fair play and substantial justice" embodied in the protective principles of due process precluded jurisdiction from lying in Virginia. The circuit court did not confuse principles of "general" jurisdiction and "specific" jurisdiction. Rather, the court analyzed the due process principles that underlie all jurisdictional decisions and applied those principles to the facts of this case.

Petitioner faults the circuit court for not doing what this Court has not done — abandoning all limits on personal jurisdiction — and urges this Court to do so because the circuit court declined a similar invitation, holding:

> " . . . . The expansion of interstate commerce, while inducing acceptance of flexible due process standards, has hardly dictated the abandonment of all limits on personal jurisdiction. . . ." (783 F.2d at 1126; Pet's App. 29-30).

The circuit court declined to abandon all limits on personal jurisdiction because the court recognized that personal jurisdiction affects two parties, not only the party wishing to sue.

> " . . . . Certain Supreme Court decisions have suggested that these jurisdictional restrictions are based upon federalism, *see e.g., World-Wide Volkswagen*, 444 U.S. at 294, 100 S. Ct. at 565, but more recent opinions establish that due process is concerned with a fundamental individual liberty interest. *Burger King*, 105 S. Ct. at 2181-82 and n.13; *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702-03 & n.10, 102 S. Ct. 2099, 2104-05 & n.10, 72 L. Ed. 2d 492 (1982). A defendant is protected by due process against being bound *in personam* by judgments of a forum with which he lacks meaningful relations. . . ." *(Id.)*

Petitioner says the circuit court should have eliminated the defendant from the due process equation it had to solve to determine if there was *in personam* jurisdiction. But due process applies to everyone, not just those who wish to sue. If defendants are eliminated from the equation, they are fair game in a forum often thousands of miles away, faced with the expense of defending at a tremendous distance or agreeing to settle to avoid that expense.

Here, petitioner claimed compensatory damages of $40,244, plus interest, and punitive damages of $120,732, claims filed after NANA offered to replace the horn. (JA 62) NANA chose to defend against those claims, to incur the expense rather than settle a claim of $160,976.00, and the court awarded Chung $8,207.00, mainly the price of the spoiled horn at $35.00 a pound. And therein lies the need to keep the defendant in the equation when determining

whether, on the given facts of a case, *in personam* jurisdiction will lie.

The circuit court held on the facts of this case there was no jurisdiction. To reverse the circuit court on these facts would establish as the rule of law that the defendant is always eliminated from resolving the jurisdictional equation and is open to whatever claim a plaintiff may wish to file in a forum often thousands of miles away,[2] but due process does not permit that.

If the facts were different, the decision of the circuit may have been different, but the facts of this case, tested against the principles of due process, sustain the circuit court's opinion.

CONCLUSION

For the foregoing, respondent NANA Development Corporation, Inc., respectfully requests this Honorable Court to deny the petition for writ of certiorari.

Respectfully submitted,

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[2] Because federal courts do not award attorney fees in diversity suits, there is no inherent constraint against the filing of such claims.